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HUMAN RIGHTS OF INDIGENOUS PEOPLES

Indigenous people and their relationship to land

Preliminary working paper prepared by Mrs. Erica-Irene Daes,
Special Rapporteur

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Introduction

1. By its decision 1997/114 of 13 April 1997, the Commission on Human Rights, at its fifty-third session, taking note of resolution 1996/38 of 29 August 1996 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities approved the appointment of Mrs. Erica-Irene Daes as Special Rapporteur to prepare a working paper on indigenous people and their relationship to land with a view to suggesting practical measures to address ongoing problems in this regard. In accordance with this decision, and basing itself on the working paper prepared by the Special Rapporteur, (E/CN.4/Sub.2/1996/40, the present preliminary working paper will form the foundation for and the framework of a more comprehensive final working paper. The working paper intends to elaborate upon the problems which exist regarding indigenous land issues, with a view to contributing to increased understanding between indigenous peoples and States concerning indigenous land issues, providing assistance for their just solution, and facilitating the further elaboration of the provisions relevant to land rights contained in the draft United Nations declaration on the rights of indigenous peoples (Sub-Commission resolution 1994/45, annex).

2. Reports and statements from indigenous peoples from all parts of the world during the sessions of the Working Group on Indigenous Populations have made clear that land and resource issues, particularly the dispossession of indigenous peoples from their lands, are issues of a central and fundamental nature. At the same time, there has been great concern on the part of certain States, academic institutions, non-governmental organizations (NGOs) and individuals that the recognition of the human rights of indigenous peoples will require that all the lands and resources ever taken from indigenous peoples be returned. Such a result is not called for.

3. There are an enormous number of problems and issues, so many that no study or paper could give them all full consideration within the short time-frame allowed for this initiative. A working paper that attempted to deal with all of the land and resource issues would necessarily be superficial and lengthy. The better course, adopted here, is to sort and organize the multitude of issues into an analytical framework and to attempt to identify

those issues or problems which are the most fundamental or most severe and, of these, which are the most deserving of attention in the search for means of alleviating the suffering and injustices endured by indigenous peoples.

4. What core values should guide our judgement in this work? First the great human rights principles embodied in the Universal Declaration of Human Rights and the International Covenants on Human Rights, particularly the prohibition of discrimination and the principles of equality and self-determination. In addition, we must be guided by the fundamental values and interests that form the foundation of the draft United Nations declaration on the rights of indigenous peoples: among others, the preservation and well-being of indigenous cultures and communities, the elimination of poverty and deprivation among indigenous peoples, and the great goals of equality and justice for indigenous peoples. It is within this context that the members of the Sub-Commission and the representatives of United Nations bodies, specialized agencies, States, indigenous peoples, academic institutions, non-governmental organizations and other individuals concerned are requested to read, consider and comment upon this preliminary working paper.

I. RELATIONSHIP OF INDIGENOUS PEOPLES TO THEIR LANDS, TERRITORIES AND RESOURCES

5. Throughout the life of the Working Group, indigenous peoples have emphasized the fundamental issue of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance of lands, territories and resources to the continued survival and vitality of indigenous societies. Essentially, indigenous peoples have illustrated the need for a different conceptual framework and the need for recognition of the cultural differences that exist because of the profound relationship that indigenous peoples have to their lands, territories and resources. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.

6. It must be noted that, as indigenous peoples have explained, it is difficult to separate one indigenous concept from another; this is especially true when trying to describe indigenous peoples' relationship to their lands, territories and resources. The relationship with the land and all living things is at the core of indigenous societies. Professor Robert A. Williams, in the context of the discussion about the territorial rights of indigenous

peoples at the Working Group, stated that "indigenous peoples have emphasized that the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories. 1/

7. Professor James sakej Henderson attempts to illustrate this distinction by stating that "the Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource ... . Their vision is of different realms enfolded into a sacred space ... . It is fundamental to their identity, personality and humanity ... [the] notion of self does not end with their flesh, but continues with the reach of their senses into the land." 2/ Such a relationship has manifested itself in the very cultural differences of indigenous peoples, such as language. For example, an Inuit elder tried to articulate this relationship by stating that "our language contains an intricate knowledge of the Arctic that we have seen no others demonstrate." 3/

8. For a number of different reasons, the international community has begun to respond to indigenous peoples in the context of a new philosophy and world perspective with respect to land, territory and resources. New standards are beng devised based, in part, upon new values generated by such a perspective and philosophy.

9. The conclusions, proposals and recommendations of Special Rapporteur José R. Martínez Cobo, 4/ volume V of the Study of the Problem of Discriminaton Against Indigenous Populations form the basis of the policy and doctrine adopted by the United Nations in regard to the relationship of indigenous peoples with their lands, territories and resources. They may in fact be the best articulation of this relationship. Mr. Martínez Cobo states:

> "It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.
>
> "For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely." 5/

10. Further examples of this acceptance include the specific reference to the "... special importance for the cultures and spiritual values of the

peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship," of article 13 of the Indigenous and Tribal Peoples Convention No. 169 (1989) of the International Labour Organization.

11. The distinctive nature of indigenous peoples' relationship to lands is also captured in the draft United Nations declaration on the rights of indigenous peoples, in both preambular and operative paragraphs. In particular, Article 25 states:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard."

12. Finally, the proposed American Declaration on the Rights of Indigenous Peoples, drafted by the Inter-American Commission on Human Rights 6/ and now under consideration by the Permanent Council of the Organization of American States, contains the following preambular language:

> "[The States,]
>
> "Recognizing the respect for the environment accorded by the cultures of indigenous peoples of the Americas, and considering the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live and their natural resources.
>
> "...
>
> "Recognizing that in many indigenous cultures, traditional collective systems for control and use of land and territory and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being ..."

13. In summary, each of these examples underscores a number of elements that are unique to indigenous peoples: (1) a profound relationship between indigenous peoples and their lands, territories and resources exists; (2) that this relationship has various social, cultural, spiritual, economic and

political dimensions and responsibilities; (3) that the collective dimension of this relationship is significant; and (4) that the inter-generational aspect of such a relationship is also crucial to indigenous peoples identity, survival and cultural viability.

II. HISTORY AND BACKGROUND: IMPACT OF THE DOCTRINES OF DISPOSSESSION

14. The gradual deterioration of indigenous societies can be traced to the non-recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other fundamental human rights. The natural order of life for indigenous peoples has been and continues to be threatened by a different order, one which is no longer dictated by the natural environment and the indigenous peoples' relationship to it. That indigenous societies are in a state of rapid deterioration and change is due to the denial of the rights of indigenous peoples to lands, territories and resources.

15. The colonization of indigenous territories has affected indigenous peoples in a number of ways. Demographic deterioration occurred through maltreatment, enslavement, suicide, punishment for resistance, warfare, malnutrition due to destruction of the natural environment or overexploitation of natural resources, disease and outright extermination. Rodolfo Stavenhagen states that "the entire population of the Americas decreased by 95 per cent in the century and a half following the first encounter." 7/ The intent to convert indigenous peoples to Christianity and bring them under the "sovereignty" of foreign monarchs created widespread havoc, despite some early attempts at "friendly treatment". With population decline came the destruction of the traditional social order, due to the efforts of missionaries and Western attitudes towards the division of labour and gender, among others. The introduction of attaching a monetary value to things that could be bought and sold, including land, added the stress of an economic environment quite opposite from the traditional economic order of most indigenous communities. These concepts were all alien to the collective social organization of indigenous communities.

16. The factual accounts relating to the dispossession and expropriation of indigenous peoples' lands are too varied, detailed and extensive to examine in this preliminary working paper. There is much to be learned from indigenous peoples worldwide about the methods and legal doctrines used to dispossess them. This will be reflected in the final working paper. At present,

however, it is critical to underscore the cultural biases that contributed to the conceptual framework constructed to legitimize colonization and the various methods used to dispossess indigenous peoples and expropriate their lands, territories and resources. It is safe to say that the attitudes, doctrines and policies developed to jusify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of States. 8/

17. The early theorists who espoused a "naturalist" framework were the first to tackle the difficult question of the place of indigenous peoples within the construction of modern international law and, in particular, indigenous peoples as rightful owners of their lands, territories and resources. These "naturalist" constructions were founded upon the notion of a higher authority and divine reason, and rooted in morality. An important feature was the principle of the equality of all human beings, which had an important place in the articulation of the application of natural law to the "Indians" of the New World.

18. Early naturalists actually advocated on behalf of the Indians against imperial and papal authority with regard to the assertions of Spanish ownership, use and exploitation of Indian lands and resources, which were based upon the doctrines of conquest and discovery. They argued that Indian peoples did in fact have rights to the land, and some went one step further by addressing, in the context of the laws of war, the rights and capacity of Indian nations and peoples to enter into treaty relations although they were "strangers to the true religion". In their construction, if Indian peoples were in fact human beings and equal, they would have "just cause" to wage war against the invaders. However, unless conquest followed a just war, Indians could not unilaterally be dispossessed of their lands or their autonomous existence.

19. Such prescriptions for the European encounters with indigenous peoples were building blocks for a system of principles and rules governing encounters among all peoples of the world. Subsequent theorists continued through the nineteenth century to include non-European aboriginal peoples among the subjects of what came to be known as the "law of nations" and later, "international law."

20. Hence, early theorists did address the question of the rights of Indian peoples in the framework of natural law, albeit without their participation or

knowledge. Nonetheless, such theorists believed that natural law did have the capacity to respond to the rights and interests of the indigenous peoples of the Americas. Whatever protection the early law of nations afforded indigenous peoples, it was not enough to stop the forces of colonization and empire as they extended throughout the globe. Theorists eventually modified the law of nations to reflect, and hence legitimize, a state of affairs that subjugated indigenous peoples. International law remains primarily concerned with the rights and duties of European and similarly "civilized" States and has its source principally in the positive, consensual acts of those States.

21. Unfortunately, established Christian and other religious values became embedded in natural law and international law, undercutting any possibility for indigenous peoples' claims, rights and values to be advanced in the years following conquest. Indigenous peoples were commonly labelled "infidels" and "pagans" in natural law discourse. Discriminatory and racist attitudes are apparent in the terminology alone. Although natural law may have been more expansive in some respects, a very narrow concept began to emerge when the Western States furthered their adventures into the New World and beyond. Their perspectives and values began to subsume indigenous nations and peoples.

22. Only through rationalization and military domination did Spain secure "ownership" of the lands, territories and resources of indigenous peoples. The territories of Indians in the Americas and elsewhere, were largely taken by military force. Where "just war" could not be waged, treaties were concluded. In regard to North America, Vine Deloria, Jr. wrote:

> "Treaty-making was a feasible method of gaining a foothold on the continent without alarming the natives. Treating with the Indians, then, brought an air of civility and legitimacy to the white settlers' relations with the Indians and provoked no immediate retaliation by the tribes. Instead of the Indians being subjected to bondage or their lands merely seized through the use of force, which Spain eventually did, civility reigned in North America. Indian land and the rights to live in certain areas were purchased at formal treaty sessions." 9/

23. What little territory remained was diminished further by forcible or coerced removal, relocation and allotment. Many indigenous communities were forced onto reservations. The severing of indigenous peoples from their lands

and territories through expropriation, dispossession, encroachment, extinguishment of rights, and other policies, doctrines and laws of States and non-recognition of the social, cultural, spiritual and economic significance of land had both short- and long-term impacts on indigenous communities.

24. The doctrines of dispossession which emerged in the subsequent development of modern international law, namely conquest discovery and terra nullius, have all had untold adverse effects on indigenous peoples. Only recently has the international community begun to understand that such doctrines are illegitimate and racist. For example, while the Permanent Court of International Justice based its decision in the Eastern Greenland case of 1933 10/ upon the same framework and attitudes, in 1975 the International Court of Justice ruled that the doctrine of terra nullius had been erroneously and invalidly applied against the tribal peoples of the Western Sahara. 11/ More recently, the High Court of Australia in its 1992 decision in Mabo v. Queensland discussed the legal and other effects of the doctrine of terra nullius. The Court essentially denounced the doctrine by concluding that this "unjust and discriminatory doctrine ... can no longer be accepted." This decision gave rise to the Native Title Act, adopted by the Australian Government in 1993, which established a framework and mechanism by which Aboriginal peoples in Australia can secure land rights. However, Australian Aboriginal peoples have reported to the Working Group that they have great difficulties with the Act, and are concerned at the assumed and unfounded State authority to extinguish land rights recognized in the Mabo decision. 12/ This demonstrates that Eurocentrism continues to be evident in legal theory and thought and that such attitudes have trapped indigenous peoples in a legal discourse that does not embrace their distinct cultural values, beliefs, institutions or perspectives. 13/

III. FRAMEWORK FOR THE ANALYSIS OF CONTEMPORARY PROBLEMS REGARDING INDIGENOUS LAND RIGHTS

25. The principal problems that will be explored in this working paper are very diverse, and it is expected that the research ahead may disclose other problems in addition to those that have been brought to the attention of the Working Group and United Nations bodies. These problems may be organized into an analytical framework that will help to clarify them and identify possible solutions. This analytical framework follows.

A. Failure of States to acknowledge indigenous rights to lands, territories and resources

26. This most fundamental and widespread problem is divided into two parts: the failure of States to recognize the existence of indigenous use, occupancy and ownership, and the failure of States to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land.

1. Failure to recognize the existence of indigenous use, occupancy and ownership

27. Countries in many parts of the world are unaware of or ignore the fact that communities, tribes or nations of indigenous peoples inhabit and use areas of land and sea and have done so, in many cases, since time immemorial. These areas are typically far from the capitals and other urban areas of the country and, typically, countries regard these lands and resources as public or "crown" lands. Although the indigenous people concerned regard themselves, with good reason, as owning the land and resources they occupy and use, the country itself disposes of the land and resources as if the indigenous people were not there. 14/ In Belize, for example, 17 logging concessions were recently granted by the Government to a foreign company to cut timber in forests where Maya people have always lived and relied on the forest for their subsistence. In Papua New Guinea, the Government encourages transmigration and settlement on lands where indigenous peoples have long lived. In Nicaragua, the Government planned an environmental preserve or park in complete disregard of the indigenous population living on that land. The Martínez Cobo study found that many countries with large indigenous populations nevertheless reported that no such peoples existed in those countries. Although this situation has improved, the problem appears to continue.

2. The failure of States to accord appropriate legal status, appropriate juridical capacity and other legal rights

28. This problem is closely related to the one discussed above. Although States know that indigenous communities, nations or groups exist and have exclusive use and occupancy of an area, some States do not acknowledge that the indigenous peoples concerned have legal entitlement or rights to the land or resources. In some situations, the indigenous peoples are regarded as using the public or national lands at the sufferance of the Government.

29. In this regard, the final working paper will give attention to the concept of aboriginal title and the relationship of this legal concept to the human rights of indigenous peoples. In many countries, particularly those of the British Commonwealth, as well as others, exclusive use and occupancy of land from time immemorial gives rise to aboriginal title, a title that is good against all but the sovereign, that is, the Government of the State. 15/ Where aboriginal title is recognized, indigenous peoples have at least some legal right that can be asserted in the domestic legal system. However, aboriginal title is normally subject to complete extinguishment by the Government of the State, without the legal protection and rights that in most countries protect the land and property of citizens. This single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples.

30. In some countries, indigenous communities do not have the legal capacity to own land, or do not have the capacity to own land collectively. Where the indigenous peoples or group is not recognized as having juridical status or existence, it cannot hold title to lands or resources nor take legal action to protect those property interests. Many countries that a generation ago denied such legal capacity to indigenous peoples have now made positive reforms, but further study of this problem is called for.

B. Discriminatory laws and policies affecting indigenous peoples in relation to their lands

31. In those countries that have developed a body of positive law and a body of jurisprudence in regard to indigenous peoples - and the number of such countries is increasing - the most significant problems appear to arise because of persistent discriminatory laws and legal doctrines that are applied to indigenous peoples and their lands and resources. 16/ The concept of aboriginal title, as discussed above, is itself discriminatory in that it provides only defective, vulnerable and inferior legal status for indigenous land and resource ownership. 17/ The final working paper will give attention to these discriminatory laws and legal doctrines because they appear to be so widespread, because they appear to be in violation of existing international human rights norms, and because they appear to be relatively amenable to correction.

1. Laws regarding the extinguishment of indigenous peoples' land and resource rights 18/

32. Practically all countries where indigenous peoples live assert the power to "extinguish" the land titles and rights of the indigenous peoples within their borders, without the consent of the indigenous peoples. The concept of extinguishment includes voluntary purchase and sale of title, but more commonly the term "extinguishment" is used to mean outright taking or expropriation, most often without just compensation. Like the concept of aboriginal title, extinguishment is a term that came into prominent use during the colonial period. 19/

33. The problem of extinguishment is related to the concept of aboriginal title. The central defect of so-called aboriginal title is that it is, by definition, title that can be taken at will by the sovereign - that is, by the colonial Government, or nowadays, by the State. Like aboriginal title, the practice of involuntary extinguishment of indigenous land rights is a relic of the colonial period. It appears that, in modern times, the practice of involuntary extinguishment of land titles without compensation is applied only to indigenous peoples. As such, it is discriminatory and unjust, to say the least, and deserving of close examination in the final working paper.

34. One particularly clear example of the problem of extinguishment is provided by the case of the Tee-Hit-Ton Indians v. United States. 20/ In this case the Supreme Court decided that the United States may (with limited exceptions) take or confiscate the land or property of an Indian tribe without due process of law and without paying just compensation. This despite the fact that the United States Constitution explicitly provides that the Government may not take property without due process and just compensation. The Supreme Court found that property held by aboriginal title, as most Indian land is, is not entitled to the constitutional protection that is accorded all other property. The racially discriminatory nature of the Tee-Hit-Ton case can be seen in the opinion, an extract of which follows:

> "No case in this court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation.

> Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. "... Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."

35. Indigenous representatives and experts have reported that many other countries have laws and policies similar to those of the United States in this regard. Canada, for example, established this doctrine in 1888. 21/

36. The legal doctrine created by this case continues to be the governing law on this matter in the United States today. The racially discriminatory character of the decision has not prevented this doctrine from being freely used by the courts and by the United States Congress in legislation, even in recent years. Indeed the Congress relied on this doctrine in 1971 when it extinguished all the land rights and claims of practically every one of the some 226 indigenous nations and tribes in Alaska by adopting the Alaska Native Claims Settlement Act. The Act provided for transferring the land to profit-making corporations that had to be created by the indigenous peoples, and for paying a sum of money to each Native corporation - a sum far less than the value of the land. The Alaska Native tribes themselves were paid nothing. The remaining lands of the territory that belonged to the tribes, or that had been claimed by them, were turned over to the State of Alaska and the United States. The Alaska Native tribes never consented to the legislation. Because of the concepts of aboriginal title and extinguishment, and because of the related discriminatory legal doctrines (which are discussed further below), it was understood that the lands of these indigenous peoples could be taken outright, without payment or just compensation. 22/

37. According to news reports, legislation is being considered in Australia that would extinguish some or most of the land rights of the indigenous peoples of Australia. As discussed above, the High Court of Australia, in Mabo v. Queensland, ruled that the doctrine of terra nullius may not be applied to deny indigenous rights to land, but nonetheless confirmed the power of the sovereign to extinguish native title was. 23/ Other examples will no doubt be found as research for the working paper proceeds.

2. Plenary power

38. Another discriminatory legal doctrine that appears to be widespread is the doctrine that States have practically unlimited power to control or regulate the use of indigenous lands, without regard for constitutional limits on governmental power that would otherwise be applicable. In the United States, this is known as the "plenary power doctrine", and it holds that the United States Congress may exercise virtually unlimited power over indigenous nations and tribes and their property. No other population or group is subject to such limitless and potentially abusive governmental power.

3. Treaty abrogation and land rights

39. Another example of the discriminatory legal doctrines that will be examined by the working paper is the law in regard to treaties made with indigenous peoples. Treaties have been used, among other purposes, as mechanisms for gaining cessions of indigenous land and for ostensibly guaranteeing rights to the remaining lands held by the indigenous nation. The problem of discrimination arises when the State later abrogates or violates the treaty. In the typical case, the injured indigenous nation or tribe has no legal remedy against the State either in the domestic law or under international law. The denial of any remedy under international law is inconsistent with the use of treaties as a legal mechanism and with the status of indigenous peoples as subjects of international law. Thus, indigenous peoples appear to be unique in being denied legal remedies for violation of their rights where the State abrogates or violates a treaty between the State and an indigenous nation, tribe or peoples. In this regard, the present Special Rapporteur welcomes the forthcoming final report by Special Rapporteur Miguel Alfonso Martínez on treaties, agreements and other constructive arrangements between States and indigenous populations.

C. Failure to demarcate

40. In terms of frequency and scope of complaints the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands. 24/ Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked.

41. Some States, such as Brazil, have strong and very positive laws requiring demarcation of indigenous lands. Other countries, perhaps the majority, have no such laws. In States with laws requiring demarcation, the implementation and execution of those laws have been weak or absent. Where such laws are lacking or weak, problems arise because, having not demarcated indigenous land, the State cannot identify what is indigenous land and what is not. As a result there are conflicts with indigenous communities. Nicaragua and Belize are examples of this kind of situation.

D. Failure of States to enforce or implement laws protecting indigenous lands

42. Some of the most grave situations, such as the massive invasion of Yanomami lands in Brazil and the resulting deaths of thousands of Yanomami Indians, took place in large part because of the State's failure to enforce existing laws. Even after demarcation of the Yanomami territory, the Government has not devoted the resources necessary to prevent the illegal invasion of thousands of gold miners. In other situations, indigenous peoples find they cannot protect their rights to lands and resources because they do not have effective recourse to the courts or other legal remedies. In the worst situations, violence, intimidation and corruption prevent effective legal action by or on behalf of indigenous peoples. This has been reported, for example, concerning efforts by Macuxi Indian peoples to protect their lands. In other settings, there is no effective legal system to provide a remedy, or indigenous peoples cannot afford to pay for necessary professional legal representation, or they cannot use the language required by the courts or legal agencies, or they cannot travel to the courts or legal agencies, or they simply do not know that legal remedies may be available. As with other human rights, the poverty, geographical remoteness and cultural and linguistic differences of indigenous peoples create severe impediments to the protection of their land, territorial and resource rights.

E. Problems in regard to land claims and return of lands

43. The long and painful history of the unjust and inhuman dispossession of indigenous peoples of their territories has resulted in many indigenous peoples having no land or resources or too little land and resources to sustain their communities and their cultures. This is by no means universally

true, but for many indigenous peoples, their future will depend on acquiring the lands and resources needed for sustainable economic development and for a degree of self-sufficiency.

44. The positive and successful measures relating to claims for land and return of land are dealt with in section IV below. This discussion addresses the problems, some of them quite severe, that have been created by some claim and negotiation procedures and land return measures. 25/

45. A particular problem that has been repeatedly brought to the attention of the Commission on Human Rights and the Sub-Commission is the use or misuse of claim procedures to deprive indigenous peoples of their rights or their claimed rights to land and resources. Numerous such problems have been reported by indigenous peoples in many countries. The problems may be summarized as follows: in some cases, an unauthorized or mistaken claim is made to a court or administrative body that the State has taken or paid an unfairly low price for an area of land originally owned by indigenous people whereas in fact, the land has not actually been taken but is still owned by the indigenous people. In other cases, the land has been taken but the indigenous people concerned does not want compensation but return of the land. These fraudulent or mistaken claims are, in effect, encouraged by legal provisions that permit the lawyer to earn a fee of as much as 10 per cent of the money award recovered. When such claims are taken to conclusion and an award of compensation is made, the payment of the award effectively extinguishes the indigenous title to the land in question. This has occurred even in situations where the Indian nation or tribe is still in possession of the land. Thus, these "claims" processes are actually continuing to deprive Indians of their lands.

46. The problems created by fraudulent and improper claims are aggravated by the lack of proper legal procedures in the claim process. Processes such as that of the now defunct Indian Claims Commission in the United States did not ensure that claimants had proper authority to act for the tribe concerned. Procedures did not give the tribes concerned proper notice or an opportunity to be heard. The Commission in more than one case permitted lawyers to act in direct opposition to their nominal client tribes and even permitted lawyers to carry on money compensation claims after the claimant tribes had dismissed the lawyer in an effort to stop the claims.

47. Although the Indian Claims Commission itself no longer exists, the cases that it handled and the problems it created continue. Some notable cases that remain unresolved are the Black Hills claim (in which the Sioux tribes have refused to accept the compensation awarded and seek a return of portions of the land) and the Western Shoshone case (in which the Western Shoshone tribes also refuse payment and seek a restoration of some of the land). In the latter case, some Western Shoshones have remained in possession of certain areas of the land supposedly taken by the United States and are resisting government efforts to interfere with their use of the land. The extensive and disruptive problems of the Indian Claims Commission have been given scholarly attention. 26/ These problems have also been the subject of complaints to the United Nations and other bodies. 27/

48. There have also been complaints about land claim mechanisms in other countries. In Canada, the process has been reported to be extremely time consuming. In New Zealand, anger has been expressed over allegedly unauthorized settlements of claims. In Australia, despite the provisions of the 1993 Native Title Act, there remains great difficulty in bringing claims to land owing to the criteria established, which are wrought with discriminatory and colonial biases. These matters will be given full attention in the final working paper because they can contribute to an understanding of problems that need to be avoided or guarded against in implementing positive, ameliorative measures.

F. Expropriation of indigenous lands for national interests, including development

49. The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from proceeding with their own forms of development, consistent with their own values, perspectives and interests. There are few regions of the world where land, territorial and resource rights are not seriously and repeatedly ignored, devalued or otherwise violated by Governments.

50. The concentration of extensive legal, political and economic power in the State has contributed to the problem of development and indigenous peoples' rights to lands, territories and resources. Moreover, the strict view of international law as solely the law of nations, and not of peoples or

individuals, has furthered this narrow State approach to development. The notion of development can be linked directly to the affirmation of "permanent sovereignty over natural resources" 28/ and the rights of States to "freely utilize and exploit" 29/ their natural resources. In this context, and of particular relevance, is the State assertion that it has complete rights to subsurface resources. Such a view has had numerous unfortunate social, economic, environmental and cultural consequences. This is especially true in the case of the world's indigenous peoples, who have until recently perceived development as a very negative concept. Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development. For years, non-governmental organizations have been saying that indigenous peoples have been deprived of much or all of their land and that it had been turned over to commercial use or for development projects. 30/ In addition, development projects designed to benefit, or which affect indigenous peoples have been carried out without consulting the peoples concerned. The Working Group has also been informed of development projects and activities that were initiated with international assistance and without the involvement, consent or consultation of indigenous peoples. Examples include State initiatives to build roads and highways with the financial assistance of the Inter-American Development Bank, and the World Bank's support for the building of dams in India and elsewhere. Other projects include the construction of dams requiring the flooding of lands and the termination of traditional economic practices of indigenous peoples, deforestation, and gold-mining projects. 31/ National economic development schemes not only dispossess indigenous peoples of their lands, but also convert indigenous peoples into cheap labourers for industry because the exploitation of their lands and the environmental degradation have deprived them of their livelihood. At its thirteenth session, an indigenous representative told the Working Group about the national parliament's approval of a contract with a logging company for an area of over 1 million hectares of rainforest. He claimed these activities would destroy his peoples' ability to live in a traditional and peaceful way. Another matter brought to the attention of the Working Group at its fourteenth session by an indigenous

representative from Asia involved a mining operation which led not only to environmental degradation, but also to rioting among the indigenous peoples affected, which in turn led to killing and torture by security forces.

51. Even in areas where economic development has resulted in the transfer of lands to indigenous communities, they have been unable to fully control such development. Specific examples include the Alaska Native Claims Settlement Act of 1971 and the James Bay and Northern Quebec Agreement of 1975. Other forms of development accompanied by blatant human rights violations include the gold mining in Yanomami Indian territory.

52. Oil and gas exploration and exploitation, geothermal energy development, mining, dam construction, logging, agriculture, ranching and other forms of economic activity in the national interest have adversely impacted both indigenous peoples who have already suffered from contact and colonialism, as well as indigenous peoples in areas long isolated by distance and geography. Often, development takes place without indigenous peoples' consent, consultation, participation, benefit, etc.

G. Removal and relocation

53. Removal of indigenous peoples from their lands and territories is both a historical and a contemporary problem worldwide. The policy of removal of indigenous peoples from their lands and territories is considered by States as an appropriate solution or a suitable means for "removing" a problem, whether it is done to purportedly protect indigenous peoples or to promote State interests in their lands, territories and resources. Such a policy must rather be acknowledged as merely a postponement in dealing with the real matter of accommodating the rights and interests of the indigenous peoples concerned.

54. Removal is so widespread that the international community has responded to it in the context of human rights standard-setting: article 16 of ILO Convention 169; article 10 of the draft United Nations declaration on the rights of indigenous peoples; article XVIII (6) of the proposed American Declaration on the Rights of Indigenous Peoples. In connection with the elaboration of these specific standards, the term "forced" removal has been used to describe the coercive and abusive actions taken by Governments, without the consent of indigenous peoples, to remove them from their land. Instances of removal include the removal and relocation of the Mushuau Innu from Davis Inlet to Nutak and the High Arctic relocation of Inuit by the

Government of Canada, the removal of Inuit in Northern Greenland by the Government of Denmark, the expulsion of Kaiowa Indians from their land by ranchers, with no action being taken by the United States Government despite recognition of Indian ownership of the lands in 1996. At the Working Group, numerous speakers have pointed to the forced expulsion of native peoples from their lands so that Governments could increase the logging and oil concessions to multinational corporations. Others have spoken of removal purportedly to protect indigenous communities from military manoeuvres or armed conflict.

55. Indigenous peoples have characterized populations transfers and forced relocation as a very serious problem. They have meant the loss of traditional lands and traditional ways of life with devastating consequences for the social and economic welfare of the communities concerned. At its eighth session in 1990 a joint statement to the Working Group by indigenous organizations highlighted the negative impact of population transfers on indigenous cultures. Governments used them to counter claims to self-determination, to impose non-indigenous national cultures, and to facilitate the disposal of natural resources. Justification for relocations included overpopulation, need for resettlement, transmigration, resource exploitation and security.

H. Other government programmes and policies adversely affecting indigenous peoples' relationship to their lands, territories and resources

56. There are a range of other government programmes and policies which must be noted because they have been widely used and abused to justify violating indigenous land rights. It appears that some States have been unaware of the baneful effects of such programmes and policies, which are briefly addressed below.

1. Allotment of land to individuals

57. Programmes of this sort divide commonly held indigenous land and allot land to individuals or families. These programmes invariably weaken the indigenous community, nation or peoples and usually result in the eventual loss of most or all of the land. The supposed advantages of permitting individuals to use their land as collateral for loans is in fact far outweighed by the almost inevitable loss of the land, and the resulting overall decline in resources available to indigenous peoples. The experience of the Mapuche peoples in Chile during the 1970s and 1980s is a sorrowful example. 32/

2. Settlement programmes

58. States often view indigenous peoples' territories as areas suitable for settlement by non-indigenous peoples - even though the resources in the area provide only a modest economy for the indigenous owners. The results of such programmes appear to be even greater poverty and social unrest. The encouragement of settlement in the Chittagong Hill Tracts is an example, and the problem has also been reported in South America.

3. State assumption of trust title

59. In certain countries, particularly in the Americas, States have created the legal notion that the State itself holds title to all indigenous lands and holds that title in trust for the various indigenous nations, tribes or peoples. This legal status for Indian land has been given scholarly attention in the United States. 33/ There are many problems with such systems of trust title. They are usually imposed without the indigenous peoples' consent. They give to the State extensive power to control the use of the land and its resources. The indigenous tribe or nation often has no adequate remedy for breach of the trust responsibility or abuse of the States' power to control or dispose of their lands and resources. The responsibility of the trustee, the State, is likely to be poorly defined. Systems of trust title make indigenous ownership of land and resources a second-class legal right, and as such they are or can be racially discriminatory.

4. Loan programmes

60. As mentioned in the section concerning allotments, programmes that encourage using indigenous lands as collateral for loans are likely to result in the eventual loss of indigenous lands and resources. This appears to be due in part to the relative lack of economic power of most indigenous peoples, as a result of which almost any programme that makes indigenous lands or resources a commodity in the marketplace is likely to result in the loss of these resources to the indigenous peoples concerned. This is not to say that indigenous peoples should not participate in market economies, but on terms of fairness and equality.

5. Management of sacred and cultural sites by Governments

61. In many countries, particular sites or areas of land that are of great religious or cultural significance to indigenous peoples are now in the ownership of the State or a governmental subdivision of the State. This situation may present a special problem, even where title to the land is not

contested, when they are managed in a way that prohibits or interferes with indigenous access or indigenous religious practices tied to the site. Information will be sought for the working paper on aspects of this problem and on management policies that do not conflict with or restrict indigenous cultural and religious use.

I. Failure to protect the integrity of indigenous lands and territories

62. Though this failure has been discussed in regard to expropriation and dispossession of lands for purposes of national development policies, for analytical purposes it is useful to identify situations that involve deprivation of indigenous land rights through activities that destroy the integrity of the environment of indigenous peoples. Specific attention should be given to this problem in the final working paper. The problems regarding environmental degradation and development do not illustrate the specific matter of State failure to protect the integrity of indigenous peoples' lands, territories and resources from both direct and indirect adverse impacts. Furthermore, this question relates to global environmental problems as well as national development initiatives.

63. One aspect of the problem is that indigenous peoples' territories and lands do not always follow State, provincial or other administrative boundaries. Indigenous Peoples whose territories transcend State boundaries include Indians in Central and South America, the Mohawk in Canada and the United States, and the Inuit of the Russian Far East, United States, Canada and Greenland. The diversity of interests, laws, policies and national development schemes in different jurisdictions can have direct adverse impacts upon the integrity of indigenous lands, territories and resources. States claiming jurisdiction or authority over territories often do not recognize the impacts that their policies will have outside their borders. For example, the current debate about the Arctic National Wildlife Refuge in Alaska is an international matter, as well as one that affects the interests of various indigenous peoples, as the indigenous peoples who depend upon the caribou habitat live in both the United States and Canada. The integrity of this wildlife resource is not being considered in the discussions about development of the area concerned.

64. In addition, though Governments may initiate and require environmental impact assessments, too often indigenous peoples' perspectives and values are overlooked in State efforts to mitigate or minimize environmental degradation.

An example is the low-level test flights in northern Canada, whose adverse impact upon the Innu peoples is not a priority, nor is it even considered an adverse impact. Other failures to protect the integrity of indigenous lands, territories and resources include trans-boundary pollution, dumping of hazardous or toxic waste, ocean dumping, ozone layer depletion, militarization, and diminishing supplies of fresh water.

65. The profound, highly complex and sensitive relationship that indigenous peoples have to their lands, territories and resources must be taken into account in protecting the integrity of their environment from degradation. Again it includes social, economic, cultural and spiritual dimensions which must not be overlooked in the present discussion. Cultures that have flourished as an integral part of the environment, cannot continue to tolerate disruption. The dependence of indigenous peoples upon the integrity of their lands, territories and resources remains a highly significant factor.

J. Land and resource use and management, and internal self-determination regarding indigenous lands, territories and resources

66. An important dimension in affirming indigenous land rights is the exercise of a measure of control over lands, territories and resources by indigenous peoples, through their own institutions. Though rights to lands, territories and resources may be affirmed, the actual exercise of internal self-determination, in the form of control over and decision-making concerning development, use of natural resources, management and conservation measures, is often absent. For example, indigenous people may be free to carry out their traditional economic activities such as hunting, fishing, trapping, gathering or cultivating, but may still be unable to control development.

67. This section has briefly surveyed a number of the problems that face both Governments and indigenous peoples. The following section provides some examples of efforts to resolve some of these contemporary problems, with a view to finding solutions for the future.

IV. EFFORTS TO RESOLVE INDIGENOUS LAND ISSUES

68. There are many positive and practical examples and advances worldwide regarding indigenous land rights; only a few can be noted in this preliminary working paper. Most of these developments represent a change in philosophy, a slight retreat from the orientation which denied the rights of indigenous peoples, and towards a modern human rights programme that is beginning to

embrace the values, perspectives and philosophies of indigenous peoples. However, no tidal change has taken place. Despite the advances and positive developments, urgent problems remain.

69. Positive measures may be divided into five groups: (a) judicial mechanisms; (b) mechanisms for negotiation; (c) constitutional reform and framework legislation; (d) indigenous peoples' initiatives; and (e) human rights standards.

A. Judicial mechanisms

70. In the sections dealing with the failure to acknowledge claims and the discriminatory policies that persist with regard to indigenous land issues, there was brief mention of the difficulties that indigenous peoples face with respect to judicial mechanisms by which they can secure their rights. The final working paper should more comprehensively survey and evaluate those judicial actions already taken by indigenous peoples, as well as consider the future of such courses of action.

71. Significant cases in both the domestic and international arenas have had mixed results. Between the 1933 decision of the Permanent Court of International Justice (Eastern Greenland) and the Western Sahara decision of the International Court of Justice in 1975, it is clear that legal thought had evolved with regard to the place of indigenous peoples. The Marshall decisions of the United States Supreme Court have been interpreted as being both good and bad: good in the sense that Marshall insisted upon the recognition of Indian land rights and the right to self-government; however, Marshall's construction or prescription of such rights was within the framework of the doctrine of discovery.

72. An example of the mixed results or limitations of judicial mechanisms is the Mabo case in Australia. This decision was positive in that it denounced the doctrine of terra nullius. However, from the perspective of Aboriginal peoples in Australia, the decision did not remove all of the cultural biases, nor did it flesh out or fully examine the assumed State authority and power to determine the extent of indigenous land rights. Politicians and judges are fearful of the unknown cost of resolving these issues. Hence, many of them ensure that openings for interpretation remain. This is evident in recent actions prompted by another case before the Australian High Court. In Wik Peoples v. Queensland, in December 1996, the High Court of Australia found that native title was not necessarily removed or extinguished by pastoral

leases. 34/ Pastoral leases cover vast areas of land and are essentially interests granted by Government for the purposes of raising sheep, cattle or other animals. This case, combined with the Mabo decision, has prompted the Federal Government to put before the Australian parliament proposals to amend the Native Title Act. The legislation focuses on the extinguishment of native title by pastoral leases. Because of such legal openings and political prerogatives, the Australian parliament remains free to exercise State authority over the rights of indigenous peoples.

73. For a limited class of cases and a limited number of indigenous peoples, United States law provides a means for the return of indigenous lands. The Supreme Court has decided that the title to land taken in violation of a certain Act of Congress remains the property of the Indian owners. However, practically no Indian lands have actually been returned by action of the United States courts. Numerous suits for the recovery of lands have been filed, and in several cases negotiation and legislation have led to the return of significant areas of land to a few Indian tribes.

74. Another example of a judicial or quasi-judicial mechanism is the Waitangi Tribunal, which is a body created on the basis of the Treaty of Waitangi in New Zealand to consider, among other matters, land claims of the Maori peoples. 35/ The decisions of the Waitangi Tribunal have been credited with resolving some long-standing Maori land grievances. However, there have also been criticisms and complaints based upon the Tribunal's limited power, as well as of some decisions and negotiated settlements reached in connection with cases before the Tribunal.

75. At present, it is safe to say that the use of judicial mechanisms may be risky due to the problem of different interpretive tools, the subjective and highly political nature of these State-chartered forums, and continuing cultural biases demonstrated by Governments. The above represent some examples of the judicial mechanisms which exist and have been employed. Governments and indigenous organizations will be called upon to supply further information about positive measures with regard to judicial mechanisms.

B. Mechanisms for negotiation

76. Mechanisms for negotiation may allow for a broader set of issues, concepts and perspectives to explore the accommodation of indigenous peoples' rights to lands. There is also greater opportunity for both sides to achieve or create genuine understanding and to engage in confidence-building.

Negotiation, if done with full respect for and recognition of the fundamental rights of indigenous peoples, can also contribute to ongoing and lasting political and legal relationships. Such an alternative may prove to be more constructive to both Governments and indigenous peoples, as well as others.

77. A recent example of the creation of an international mechanism for negotiation is the formation of the Arctic Council, which includes eight Arctic-rim States and representatives of the Association of Small Nations of the Russian North, the Nordic Saami Council and the Inuit Circumpolar Conference. The basic document of this new body also provides for the direct participation of other indigenous peoples' organizations in this geographic region. Though indigenous peoples are not entirely pleased with the few qualifications put into the document, they are nonetheless at the negotiating table and able to register their concerns relating to environmental and development matters.

78. Another international mechanism was the procedure that resulted in the negotiated peace agreements in Guatemala. Within this process, the United Nations played a role in the conclusion of the Agreement on the Identity and Rights of Indigenous Peoples. The Agreement includes far-reaching provisions on indigenous lands, restitution, acquisition of land and other measures. 36/

79. In Canada, the provincial Government of British Columbia established a Treaty Commission whose purpose is to facilitate the negotiation of agreements between indigenous peoples and the provincial and federal Governments. To date, the British Columbia Treaty Commission has not ushered a final agreement through its entire process; it is therefore too early to assess the Commission's usefulness.

80. Other recent negotiated agreements include the Nunavut Agreement (creating a new territory in northern Canada) and the agreement of the Council for Yukon Indians. Others must exist, and it is hoped that Governments and indigenous peoples will be prepared to share these developments for inclusion in the final working paper.

81. Finally, the substantive, constructive and formal dialogue at the international, national and local levels concerning international indigenous human rights standards may prove to be a more fruitful method or mechanism for creating understanding about the values and perspectives of indigenous peoples. Such a process of education will be necessary for effective steps to

be taken towards resolving long-standing conflicts and understanding the implications of accommodating the competing rights and interests of indigenous peoples and States.

C. Constitutional reform and framework legislation

82. In certain countries, significant steps have been taken to recognize or secure indigenous land rights through specific legislation to return certain areas of land or through general, framework legislation to protect indigenous land or resolve indigenous land issues. A particularly notable example in recent years is the Constitution of Brazil, adopted in 1988. 37/ The Constitution incorporates significant provisions calling for the demarcation and protection of indigenous lands. The Native Title Act of 1993 in Australia is another example. States, indigenous organizations and others will be strongly urged to assist in identifying and calling attention to other positive legislative measures regarding indigenous land and in evaluating the relative merits and actual or probable success of these measures.

83. Some countries have more specific actions to return land to indigenous peoples or to recognize or respect indigenous land areas. These measures also need to be identified and discussed in the final working paper. Examples include returns of land to indigenous peoples in Argentina. 38/ Under constitutional reform laws of 1994, the Government has now returned almost 4 million acres to some of Argentina's 600,000 indigenous peoples and plans to hand over 988,400 more acres by 1999. In Colombia, similar returns of land have taken place in recent years. Information about the success of these measures and the problems associated with them deserve close attention.

84. The Greenland Home Rule Act of November 1978 is probably one of the best examples of constructive framework legislation to accommodate the rights and aspirations of indigenous peoples. The rights of ownership to lands in Greenland have been arranged in a very distinct fashion, consistent with the Greenlandic Inuit land tenure systems. One significant feature of the Act is the granting to the Inuit of authority to make decisions concerning the use of the lands. In particular, with regard to development activities, the Greenland Home Rule Government, or Landsstyret, which is elected by the parliament, has veto power over development activities.

85. Despite the failure of a referendum to approve the Charlottetown Accord, the constitutional debate in Canada allowed for the exploration of a more effective context for the realization of rights and principles that may guide

relations between the Government and indigenous peoples. This process generated awareness and increased knowledge, through national debate, about the distinct rights and status of indigenous peoples in Canada. Again, though it did not respond sufficiently to such fundamental concerns as the need of indigenous peoples for an adequate land and resource base and the obligations of the State, the Accord provided for a constructive political and legal relationship, in the context of the Constitution, between indigenous peoples and the Government.

D. Indigenous peoples' initiatives

86. It must be noted that indigenous peoples themselves are initiating various projects and programmes with regard to their lands, territories and resources which contribute to the safeguarding and promotion of their rights. Examples include management and co-management of resources in Alaska and elsewhere. Indigenous peoples are also contributing to global and national environmental protection initiatives. For example, the role of indigenous non-governmental organizations at the United Nations Conference on Environment and Development was critical to the drafting and adoption of Chapter 26 of Agenda 21. This is a positive contribution by indigenous peoples to the world community.

87. In Belize, the mapping project of the Toledo Maya Cultural Council is an important model that addresses a wide range of issues and problems with regard to indigenous lands, territories and resources. Mapping by indigenous peoples as a means of clarifying land rights is also being done in other countries. The role of indigenous peoples in the Arctic Council, which primarily concerns itself with environmental protection and development in the Arctic, is another useful example.

E. Human rights standards and mechanisms

88. The existing and emerging norms and minimum standards contained in the Rio Declaration, ILO Convention No. 169, the proposed American Declaration on the Rights of Indigenous Peoples and the draft United Nations declaration on the rights of indigenous peoples should all be seen as a way to resolve the problems between States and indigenous peoples. The various mechanisms established for dealing with human rights complaints have been used to some extent by indigenous peoples. The final paper will review those cases and, where appropriate, include them.

89. In addition, the emerging human rights norms relating to the right to development, intergenerational rights, the right to peace, and the right to a safe and healthy environment are areas in which indigenous peoples are beginning to influence old thinking and bring about the progressive development of standards that are more sensitive, responsive and useful to indigenous peoples and humankind generally. The conclusions of the Bruntdland Report should not be omitted from this review of change and development of human rights standards. Our Common Future, the report of the Bruntdland Commission, gave recognition to the unique situation of indigenous peoples:

> "The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and other resources that sustain their way of life - rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their areas. 39/

V. CONCLUSION

90. This preliminary working paper illustrates the need for a fluid and flexible atmosphere surrounding such issues. It must be acknowledged that there is an important evolution taking place. The ongoing development of indigenous peoples' rights to lands, territories and resources must be seen as an opportunity for both indigenous peoples and States to contribute to the progressive development of human rights standards. States cannot attempt to freeze concepts, rights and, indeed, indigenous peoples themselves, in time. Indigenous communities and societies change and evolve like all other societies.

91. This preliminary working paper, above all else, should be regarded as evidence of the urgency of indigenous land issues. There is an urgent need to find solutions to the long-standing problems that exist between Governments and indigenous peoples. The very survival of indigenous peoples is at risk due to the continuing threats to their lands, territories and resources.

92. The final working paper can provide the basis for the identification and analysis of innovative legal procedures and positive measures being taken by States and indigenous peoples in this area. Also, the final working paper intends to build upon the standard-setting activities of the United Nations system by providing a practical orientation for the land rights standards developed in the draft United Nations declaration on the rights of indigenous peoples.

93. Governments, indigenous peoples and the United Nations itself must prepare for the next century. We must do so through a collaborative strategy, not one of conflict and competition, based upon a firm human rights foundation.

VI. RECOMMENDATIONS

94. The Special Rapporteur expresses her sincere wish that it will be possible for the members of the Sub-Commission, the representatives of Governments, indigenous communities and organizations as well as representatives of the United Nations system and other non-governmental organizations concerned to submit comments and express their views during the consideration of this working paper by the Working Group and by the Sub-Commission.

95. The Special Rapporteur recommends that this preliminary working paper on indigenous peoples and their relationship to land be transmitted to Governments and indigenous communities and organizations, as well as to the competent organs and bodies of the United Nations system, with the request to provide further relevant information and to submit comments to the Special Rapporteur as soon as possible, in order to be taken into account in her final working paper, to be submitted to the Working Group on Indigenous Populations at its sixteenth session and to the Sub-Commission at its fiftieth session.

Notes

1/ Robert A. Williams, "Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world", Duke Law Journal, 1990, p. 981.

2/ James sakej Henderson, "Mikmaw tenure in Atlantic Canada", Dalhousie Law Journal, vol. 18, No. 2, 1995, p. 196.

3/ Statement by Eben Hopson, founder of the Inuit Circumpolar Conference (ICC), at the organizing conference held in Barrow, Alaska, in June 1977. This was also contained in a statement by the ICC representative to the Working Group in 1985.

4/ United Nations pulbication, sales No. E.86.XIV.3.

5/ Ibid., paras. 196 and 197.

6/ Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 1333rd session, 95th regular session.

7/ Rodolfo Stavenhagen, "The status and rights of the indigenous peoples of America", report prepared for the Inter-American Commission on Human Rights, July 1991.

8/ The views of early international legal theorists are discussed in Robert Williams, The American Indian in Wesern Legal Thought: The Discourses of Conquest, Oxford University Press, 1990, and "The Medieval and Renaissance origins of the status of the American Indian in Western legal thought", Southern California Law Review, vol. 57, No. 1. 1983, pp. 68-85. See also S. James Anaya, Indigenous Peoples in Internaticnal Law, Oxford University Press, 1996.

9/ Vine Deloria, Jr., American Indians, American Justice, University of Texas Press, 1983, p. 36.

10/ Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J. (ser.A/B) No. 53.

11/ Western Sahara, Advisory Opinion, 1975 I.C.J. 12.

12/ Reports of the Working Group on Indigenous Populations E/CN.4/Sub.2/1993/29, E/CN.4/Sub.2/1994/30 and Corr. 1, E/CN.4/Sub.2/1995/24 and E/CN.4/Sub.2/1996/21 and Corr. 1. See also, Willheim, "Queensland pastoral leases and native title", Aboriginal Law Bulletin, vol 3, No. 89, 1997, p. 20; M. Dodson, "Human rights and extinguishment of native title", 1995.

13/ See also the Conclusions and Recommendations contained in the Report of the Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States, Geneva, 16-20 January 1989, (HR/PUB/89/5).

14/ Rodolfo Stavenhagen, op. cit., p.22. The situation of indigenous peoples of the Philippines is addressed in the Paper prepared by Donna Gasgonia for the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, Whitehorse, Canada, 24-28 March 1996 (E/CN.4/Sub.2/AC.4/1996/6/Add.1).

15/ See Newton, "At the whim of the Sovereign: Aboriginal title reconsidered", Hastings Law Journal, vol. 31, No. 1215, 1980; Cohen, "Original Indian title", Minn L. Rev., vol. 32, 1947; Smith, "Concept of native title",

Toronto Law Journal, vol. 24, No. 1, 1974; McHugh, "The constitutional role of the Waitangi Tribunal", New Zealand Law Journal, vol. 224, No. 3, 1985.

16/ See report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, op. cit.

17/ Felix Cohen, the foremost scholar of United States law in regard to Indian affairs, commented on the discriminatory nature of property ownership by Indian tribes: "That there are peculiar incidents attached even to fee-simple tenure by an Indian tribe is an undoubted fact, and the explanation of this fact is probably to be found in the contagion that has emanated from the concept of aboriginal possession." Handbook of Federal Indian Law, 1942, p. 291.

18/ See P. Joffe and M.E. Turpel, Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives. A comprehensive study by the Royal Commission on Aboriginal Peoples (Canada), 3 volumes, June 1995; and Treaty Making in the Spirit of Coexistence: An Alternative to Extinguishment. A report by the Royal Commission on Aboriginal Peoples Ottawa, 1995.

19/ See Vattel, The Law of Nations, Book 1, 1805, chap. XVIII. An account of the extinguishment policies of Spain, France and England during the colonial period is set forth in Royce, "American Indian land cessions", Introduction by Cyrus Thomas, Bureau of American Ethnology, Eighteenth Annual Report, 1899.

20/ 348 U.S. 272 (1995).

21/ St. Catherines Milling Co. v. Queen, (1888) 14 App. Cas. 46; 2 C.N.L.C. 541; 58 L.J.P.C. 54; 60 L.T. 197; 5 T.L.R. 125, affirming 13 S.C.R. 577.

22/ The Alaska Native Claims Settlement Act and its consequences are discussed in full detail in Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission, 1985. Commissioner Berger presented the report to the thirteenth session of the Working Group on Indigenous Populations in 1995, on behalf of the Inuit Circumpolar Conference, the non-governmental organization which sponsored the Commission project.

23/ Michael Dodson, op. cit.

24/ Roque Roldán Ortega, "Notes on the legal status and recognition of indigenous land rights in the Amazonian countries", Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, op. cit. See also Stavenhagen, op. cit.

25/ See report of the Working Group on Indigenous Populations on its seventh session (E/CN.4/Sub.2/1989/36).

26/ Newton, "Indian claims in the courts of the conqueror", 41 American University Law Review, vol. 41, No. 753, 1992; Barsh, "Indian claims policy in the United States", North Dakota Law Review, vol. 58, No. 7, 1982; Orlando,

"Aboriginal title claims in the Indian Claims Commission: United States v. Dann and its due process implications", Environmental Affairs, vol. 13, No. 241, 1986.

27/ See for example, S. Tullberg, R. Coulter, and C. Berkey, Indian Law Resource Center, "Violations of the Human Rights of the Sioux Nation, the Six Nations Iroquois Confederacy, the Western Shoshone Nation and the Hopi Nation by the United States of America", a complaint communicated to the United Nations Commission on Human Rights under the confidential "1503" procedure on 12 March 1980; Petition of Mary and Carrie Dann and the Dann Band of the Western Shoshone Nation to the Inter-American Commission on Human Rights, 3 April 1993.

28/ General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Permanent sovereignty over natural resources".

29/ General Assembly resolution 626 (VII) of 21 December 1952, entitled "Right to exploit freely natural wealth and resources".

30/ See, for example, Report of the Working Group on Indigenous Populations on its seventh session (E/CN.4/Sub.2/1989/36). In regard to hydroelectric development and the indigenous peoples of the Chittagong Hill Tracts, see the report of the Chittagong Hill Tracts Commission, May 1991. See also Rajkumari Chandra Kalindi Roy, Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh (Norwegian Agency for Development Corporation (NORAD), 1996).

31/ Reports of the Working Group on Indigenous Populations (E/CN.4/Sub.2/1989/36; E/CN.4/Sub.2/1993/29).

32/ Thomas R. Berger, Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992, Douglas & McIntyre, Ltd., 1991, p. 99.

33/ See, e.g., Ball, Constitution, Courts, Indian Tribes, 1987 A.B.F. Res. J. 1, 63 (1987); Newton, "Enforcing the Federal-Indian trust relationship after Mitchell", Catholic University Law Review, vol. 31, No. 635, 1982.

34/ This case is discussed in Willheim, op. cit.

35/ See Durie and Orr, "The role of the Waitangi Tribunal and the development of a bicultural jurisprudence", 14 New Zealand Universities Law Review, vol. 14, No. 62, 1990.

36/ R. Plant, "Addressing indigenous land rights and claims: the role of international technical assistance", paper prepared for the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims (E/CN.4/Sub.2/AC.4/1996/6/Add.1).

37/ With reference to other countries in the Amazon region, see Roldán, op. cit. In regard to recent legislation in Chile, see Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims (E/CN.4/Sub.2/AC.4/1996/6).

38/ The New York Times reported on 20 March 1997, that the Government of Argentina had restored ownership of the 308,900 acres of ancestral lands to the Collas Indians.

39/ Gro Bruntdland, Our Common Future, Oxford University Press, 1987.

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Forty-ninth session
Agenda item 7 (a)

HUMAN RIGHTS OF INDIGENOUS PEOPLES: INDIGENOUS PEOPLES AND THEIR RELATIONSHIP TO LAND

Preliminary working paper prepared by
Mrs. Erica-Irene Daes, Special Rapporteur

Corrigendum

GE.97-13355 (E)

Paragraph 2

Replace last sentence with the following text:

Because of diversity of history, political relationships and developments, and past and present legal issues, such matters will have to be reviewed on a case-by-case basis, if possible, by both indigenous peoples and States to determine the accommodation and affirmation of the land rights of indigenous peoples. This matter is addressed in section III of this working paper.

Paragraph 6

Insert " at the end of the paragraph.

Paragraph 8

The last sentence should read as follows:

New standards are being devised based, in part, upon the values that have been expressed by indigenous peoples, which are consistent with indigenous peoples' perspectives and philosophy about their relationship to their lands, territories and resources.

Paragraph 9

Replace the second sentence with the following text:

They accurately reflect indigenous peoples' articulation of this distinct relationship.

Paragraph 13

Add the following text to the end of the paragraph:

There may be additional elements related to indigenous peoples and their relationship to lands, territories and resources which have not been captured by these examples. The Special Rapporteur welcomes the comments of all concerned to ensure that the final working paper captures the essence of this profound relationship.

Paragraph 14

The last sentence should read:

Indigenous societies in a number of countries are in a state of rapid deterioration and change due to the denial of the rights of the indigenous peoples to lands, territories and resources.

Paragraph 23, third sentence

Before extinguishment insert purported

Paragraph 24

Line 2: after conquest insert,

Line 18: for at read about

Paragraph 29

Replace the penultimate sentence with the following text:

However, aboriginal title is often subject to the illegitimate assumption of State power to extinguish such title, in contrast to the legal protection and rights that, in most countries, protect the land and property of citizens. This is discussed further in paragraphs 32-37 below.

Paragraph 37

At the end of the paragraph delete was

Paragraph 88

After Rio Declaration, insert Convention on Biological Diversity,

Paragraph 89

At the end of the paragraph insert "

Paragraph 90

At the beginning of the last sentence insert It must be acknowledged that

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